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Supreme Court of the United States.

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No. 332.

THE TOT-IN-BAY WATER WORKS, LIGHT AND RAILWAY COMPANY, APPELLANT,

vs.

CHARLES W. RYAN AND J. WILLIAM RYAN, SURVIVING PARTNERS OF THE LATE PARTNERSHIP OF ARBUCKLE, RYAN & CO., ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF OHIO.

BRIEF FOR APPELLANT.

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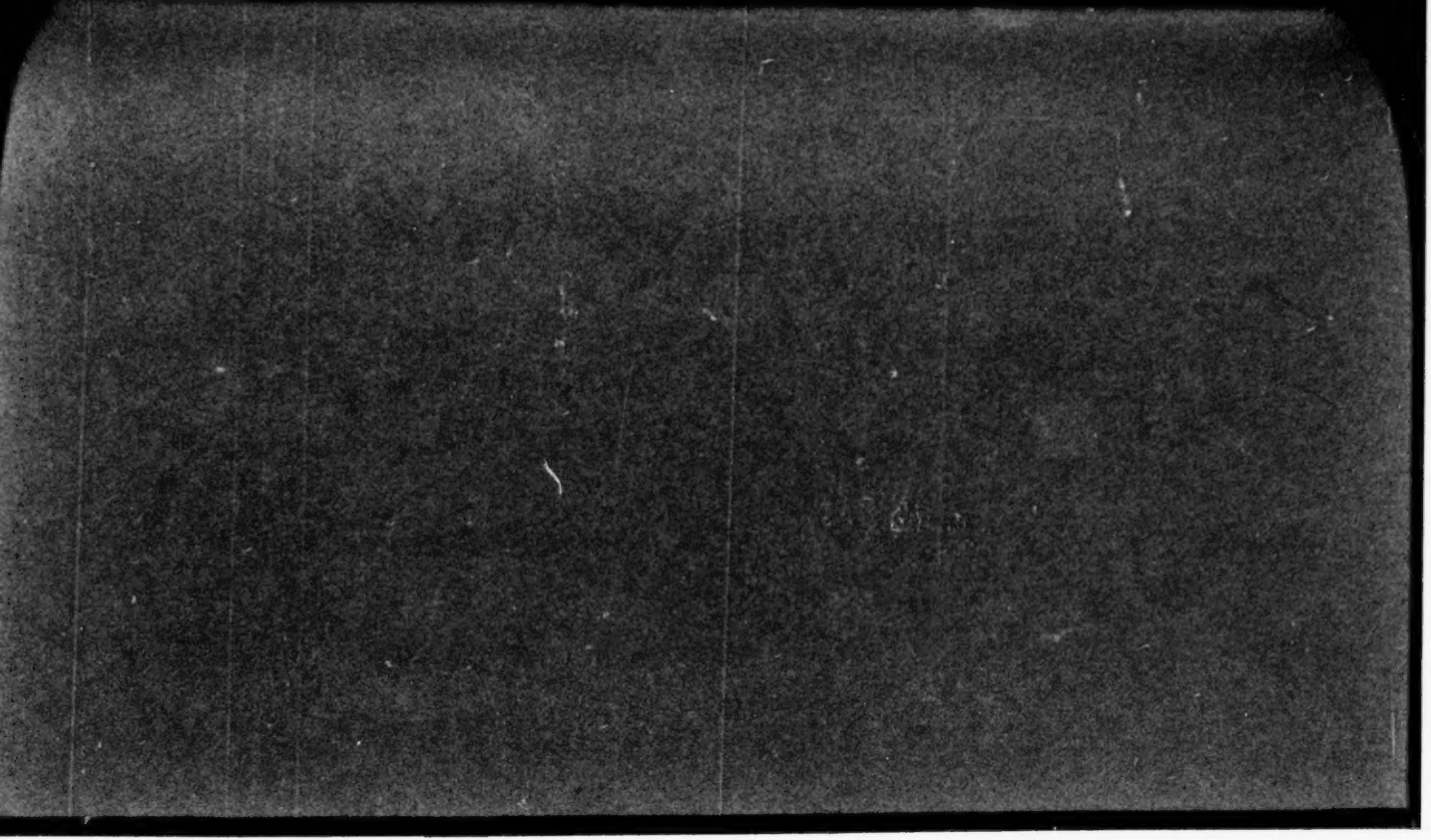

SUPREME COURT OF THE UNITED STATES.

THE PUT-IN-BAY WATER WORKS, LIGHT and RAILWAY COMPANY, *Appellant*,

vs.

CHARLES W. RYAN and J. WILLIAM RYAN, surviving partners of the late partnership of ARBUCKLE, RYAN & COMPANY, ET AL., *Appellees*.

On Appeal.

No. 332.

Brief for Appellant.

STATEMENT OF THE CASE.

This proceeding is an appeal from the final decrees of the United States Circuit Court for the Northern District of Ohio, in a cause originally instituted by The Electrical Supply Company against The Put-in-Bay Water Works, Light and Railway Company and others, to enforce a claim and lien for materials and supplies furnished in the construction of the appellant's electric plant and railway, lo-

cated on Put-in-Bay or South Bass Island, Ottawa County, Ohio, and for the marshalling of liens. The appellant, a corporation created under the laws of Ohio, complains of said final decrees, as well as various previous orders, interlocutory in their nature and made at different times throughout the progress of the suit (all as specified in the Assignment of Errors filed herein), and appeals from the same, for the sole reason, as the Judge has certified in allowing the appeal, that the said Circuit Court was without jurisdiction and should have dismissed said cause.

In the language of the Judge's certificate, the appellant having denied the jurisdiction of the Court over said cause on the grounds that the amount in controversy was in truth much less than the sum of $2,000, exclusive of interest and costs, and that the cause had been fraudulently and collusively instituted by the parties thereto for the purpose of creating the appearance of jurisdiction not in fact existing, the contention was overruled so far as related to the Receiver's certificates and the intervening petitions. (See Printed Transcript, page 141).

After retaining the cause for a period of seven years, against the repeated objections of the appellant, final decrees were made in December, 1899, sustaining and enforcing the claims and liens of Arbuckle, Ryan and Company, so styled, for $15,033.44, Barbour and Starr, so styled, for $784.85, The Bodefield Belting Company for $486.88, and of Walker P. Hall and E. J. Dodge, as holders of receiver's certificates, for more than $10,000, to satisfy which the property of the appellant was ordered to be sold, and was sold for $16,501.00 to J. W. and C. W. Ryan, so styled, who are among the appellees herein; and said fund has been distributed since this appeal was taken.

We assume that appellant will not be restricted to the exact phraseology of the Court's certificate of the jurisdictional question involved, if the record itself may be found to amplify it, and, therefore, we take the privilege at this introductory point of adding that the want of jurisdiction referred not only to the true amount of the complainant's claim and the fact of collusion, but also to the fact that the inhibition contained in Section 720 of the Revised Statutes of the United States was plainly disregarded. Moreover, the jurisdiction complained of was asserted and enforced not only for the protection of the receiver's certificates and intervening claimants, but also to compel the payment by the appellant of every dollar of the many dollars of costs which had accrued throughout the entire progress of the litigation.

The best statement of the case, as revealing the question involved and the manner in which it was raised, as the 21st Rule of this Court requires, would seem to be an abstract of the proceedings as the record exhibits them in the pages of the Printed Transcript, said pages being indicated by the figures in brackets in the abstract which follows below.

On the 9th day of September, 1892, The Electrical Supply Company, a Connecticut corporation, filed in said United States Circuit Court its bill of complaint against The Put-in-Bay Water Works, Light and Railway Company, The Railway Equipment Company, an Illinois corporation, Arbuckle, Ryan and Company, a partnership in Ohio, James K. Tillotson, a citizen of Ohio, The Cleveland Electrical Manufacturing Company, an Ohio corporation, The Industrial and Mining Guaranty Company, a New York corporation, John P. Carrothers, a citizen of New York, and H. H. Warner, a citizen of New

York, alleging that it had a valid claim against The Put-in-Bay Water Works, Light and Railway Company amounting to $2,787.04, for certain material sold, furnished and used in the construction of said Company's electric railway, and also, by virtue of certain proceedings taken under the statutes of Ohio, had a good and valid lien upon the property constituting said electric railway. The bill alleged that the said James K. Tillotson and the other co-defendants claimed to have some interest in said property, and, asking that they might be required to appear and set up their interests, the bill also prayed that an account might be taken of the complainant's claim for material and a lien therefor be declared, and the property sold for the satisfaction of the same (1-3). The bill was signed and verified by one L. G. Richardson as Solicitor for the Complainant.

On September 10, 1892 (the day following the filing of the bill), the defendant, Tillotson, a citizen of Ohio, appeared and filed an answer and cross-bill (5-11) setting forth a history of the creation, organization and capitalization of The Put-in-Bay Water Works, Light and Railway Company, and alleging that he was the Vice President of the Company and the owner of 1,545 shares of its 1,500 shares of authorized capital stock, and that he was also the owner of 125 bonds, of $1,000 each, which had been issued by the Company and were secured by first mortgage on its railway property, in which mortgage The Atlantic Trust Company, a New York corporation, was the mortgagee in trust for the holders of said bonds; that said stock and bonds had been given and delivered to him, the said Tillotson, by the Company to pay him for the work done and the material and property used in the construction of the railway and its appurtenant plant, under a contract between him and the

said Company, the terms of which contract were set forth in detail in the bill. The said Tillotson further alleged in his said answer and cross-petition that he had, in June, 1892, in an effort to negotiate the sale of the said bonds, entered into a contract in New York City with the co-defendants, The Industrial and Mining Guaranty Company (a New York corporation), John P. Carrothers and H. H. Warner (citizens of New York), whereby the said co-defendants agreed to negotiate the sale of said bonds on certain terms and conditions, alleged in detail, and in furtherance of which said contract, he, the said Tillotson, had placed the 125 bonds and 1,000 shares of the stock in the possession of the said co-defendants; that said co-defendants had failed to comply with their contract and were, therefore, not entitled to retain possession of said bonds and stock, and were wrongfully threatening to sell and dispose of the same, and were insolvent; and by his said answer and cross-petition the said Tillotson prayed that a restraining order should issue against the said John P. Carrothers, H .H. Warner and The Industrial and Mining Guaranty Company forbidding them, during the pendency of the suit, from negotiating, selling, or otherwise disposing of any of said bonds or stock, and also restraining them from transferring any of said stock upon the books of the Railway Company, and that a writ of subpoena might issue commanding said defendants to appear and show cause why said bonds and stock should not at once be returned to the defendant, Tillotson, and that on the final hearing of the case said restraining order be made perpetual; also praying the court to appoint a receiver to take charge and custody of the railway property in plaintiff's bill of complaint described.

Immediately upon the filing of said answer and cross-petition, and without notice to or the presence of any of the other parties to the bill than the said Tillotson, a temporary restraining order was issued and a receiver, L. S. Baumgartner, was appointed as prayed for (11, 15).

On September 26, 1892, The Put-in-Bay Water Works, Light and Railway Company filed its answer (16-17), admitting that it had purchased material from the complainant to be used in the construction of its railway, but denying that the articles mentioned in Exhibit "A," attached to complainant's bill, was a true and correct statement of the material furnished by complainant and used by said Railway Company in the construction of its said railway; and alleging, on the contrary, that a large part of said material was sold and delivered by the complainant to the said James K. Tillotson for the purpose of being used, and they were used, in the construction of certain property known as the Hotel Victory on South Bass Island; that the material sold by complainant to the Railway Company was not of the value of $2,787.04, as set forth in the bill, but amounted in value to only about the sum of $700, and no more; that complainant well knew that a large part of said material was sold and delivered to the said Tillotson for the the purpose of being used in the construction of a hotel and had no connection whatever with the said railway; that the complainant had procured a lien to be filed with the Recorder of Ottawa County, Ohio, against the railway property, on the day previous to the filing of the bill, for the entire amount of the material sold to Tillotson and the material sold to the defendant Railway Company, and had procured said lien for that amount *at the request of*

said Tillotson, for the express purpose of enabling the complainant to institute this action in the Federal Court.

On September 26, 1892, the co-defendant, John P. Carrothers, filed his answer to the answer and cross-bill of Tillotson (18, 19), taking issue with Tillotson's allegation that the said Carrothers, Warner and The Industrial and Mining Guaranty Company had failed to perform their contract concerning the negotiation and sale of said bonds, and alleging that on the 25th day of July, 1892, at a meeting of the stockholders of said Put-in-Bay Water Works, Light and Railway Company, he, the said Carrothers, had been elected president of the said Railway Company by the unanimous vote of all the stockholders; that as such president he had requested the said Tillotson to deliver to him the possession of said railroad, and also all the papers, contracts and personal property belonging thereto; that said Tillotson had declined to comply with said request, but continued to retain forcible possession of said property, until the 3d day of September, 1892, when the said Railway Company obtained possession and control of said railway by virtue of a writ of replevin, and that he, the said Carrothers, as president of said Railway Company, had possession of said railway property under said writ of replevin from said 3d day of September, 1892, until the appointment of a receiver in this action.

On September 26, 1892, The Put-in-Bay Water Works, Light and Railway Company filed its answer to the answer and cross-petition of the said Tillotson (21-25), the material allegations of which, so far as this appeal is concerned, being, that on or about the 3d day of September, 1892, the said defendant, Tillotson, attempting to interfere with the said Company in the operation of its railway, and to

prevent the said Railway Company from having the peaceable enjoyment of said property, the Common Pleas Court of Ottawa County, Ohio, on the petition of said Put-in-Bay Water Works, Light and Railway Company, issued a restraining order enjoining the said Tillotson from interfering or attempting to interfere in any manner with the said Company in the operation of its railway, and which said restraining order was in full force and effect.

On September 30, 1892, Arbuckle, Ryan and Company, so-called, filed their answer and cross-petition, setting up a claim of $11,153.60 for work and material performed and furnished by them for the said Railway Company in the construction of its said railway, and their compliance with the statutes of Ohio, whereby they had acquired a lien upon said property for the payment of said claim, and asking that the amount due and owing to them might be ascertained and a lien therefor be declared and that the same might be satisfied out of the proceeds of the sale of the property.

With the record in the condition as thus far shown, the receiver, on October 15, 1892, filed his motion (28) asking for leave to issue certificates of indebtedness for the purpose of raising money to enable him to meet the needs and necessities of the property in his hands, to the extent of $5,000.00, and upon the same day, without notice to The Put-in-Bay Water Works, Light and Railway Company, said order was granted. Under this order the receiver issued his certificates in the sum of $5,000.00, but at what date they were negotiated has not been made to appear.

On October 29, 1892, The Industrial and Mining Guaranty Company filed its motion for a dissolution of the injunction, and on the same day The Put-in-Bay Water Works,

Light and Railway Company filed a motion for the discharge of the receiver (31, 32). In support of these motions certain affidavits were filed, namely, the affidavit of John P. Carrothers (32-38) and the affidavit of Franklin S. Terry (40, 41). The affidavit of Carrothers reiterated the fact that on the 3d of September, 1892, the property in question had been replevined from the said Tillotson, and that the company was in possession under the said replevin, and that Tillotson, still persisting in his interference with the operation of the road, was, on the 3d day of September, 1892, enjoined by an injunction issued by the Common Pleas Court of Ottawa County, Ohio, from further interfering with the company's operation of said railway. The affidavit of Franklin S. Terry set forth the facts that he was the manager and attorney in fact of the complainant, The Electrical Supply Company, and that on September 6, 1892, his company was approached by one L. G. Richardson, representing himself to be an attorney practising at Toledo, Ohio, and as being familiar with the affairs of The Put-in-Bay Water Works, Light and Railway Company; that Richardson advised affiant to file a lien for The Electrical Supply Company against The Put-in-Bay Water Works, Light and Railway Company for the amount of its claim and to authorize him to commence suit against the Railway Company in the Federal Court, asking for a foreclosure of said lien and for an accounting; *and that the object of said suit was for the purpose of enabling the defendant, Tillotson, to file therein his cross-petition for the purpose of having a receiver appointed;* that on September 15, 1892, affiant received a letter from Richardson, stating that he had filed a lien against the said Railway Company and had brought suit in the name of The Electrical

Supply Company, asking for a foreclosure and an accounting; that the complainant corporation was induced and led into said proceedings innocently and ignorant of the facts which had been suppressed by Tillotson and Richardson; that complainant corporation was induced to include all sums due for material furnished for the Hotel Victory Company in the account against the Railway Company; that the material actually used in the construction of the railway amounted to $861.23, and that the balance, $1,925.81, was for material used in the construction of the Hotel Victory; that the said Richardson prepared the lien and the bill filed in this action and advised affiant that said lien and the allegations in said bill were proper ones for the complainant to verify.

No replication was ever filed by complainant or Tillotson to the answers of Carrothers and The Put-in-Bay Water Works, Light and Railway Company, nor was any evidence offered to refute the allegations in those answers and in the affidavits of Carrothers and Terry relating to the collusive bringing of this suit, the lack of jurisdictional amount, the fact that the railway property was in possession of the Company under the replevin from Tillotson, and the fact that Tillotson was resting under an injunction of the Common Pleas Court of Ottawa County, Ohio, barring him from the possession and operation of the railway property; but pending the hearing of the motion to dissolve the restraining order issued in this cause and the motion to discharge the receiver, there was filed a motion by the receiver on December 21, 1892 (43, 44) for an order authorizing him to issue and dispose of additional certificates of indebtedness to the extent of $5,000, to enable him to

meet the needs and necessities of the property in his hands and to pay labor claims.

On the following day, December 22, 1892, the Court heard the motions to dissolve the restraining order and to discharge the receiver, and also heard the motion of the receiver for authority to issue forther certificates of indebtedness, and on the same date entered its orders (1) overruling the motion to dissolve the restraining order, and (2) refusing to discharge the receiver, and (3) granting the receiver authority to issue additional certificates in the sum of $5,000 (44, 45).

On January 20, 1893, an appeal was prayed by The Industrial and Mining Guaranty Company, and was allowed, from the order refusing to dissolve the injunction and continuing it in force, one of the grounds being that the Court erred in retaining jurisdiction of the cause (46). The appeal was taken to the Circuit Court of Appeals for the Sixth Circuit, and pending the hearing on appeal, Marcus B. Barbour and Roland Starr, citizens of Ohio and partners doing business as Barbour & Starr, and The Bodefield Belting Company, an Ohio corporation, were permitted to intervene and to set up claims and liens against the Railway Company and its property, for supplies sold and furnished, the former for the sum of $538.74, and the latter for the sum of $338.11 (49, 50).

On September 20, 1893, there was filed with the clerk in this cause the opinion of the Circuit Court of Appeals on the appeal from the order continuing the injunction, and on October 21, 1893, the mandate of that court referring to said opinion was filed. The judgment of the Circuit Court of Appeals reversed the decree of the lower Court and commanded the dissolution of the injunction, for the

reason that the evidence showed that the Court had no jurisdiction of the cause because of the lack of sufficient amount in complainant's real claim, the collusion by which the jurisdiction had been sought, and also because of the the unlawful interference through this proceeding with the proceedings in replevin and for an injunction in the State court.

The mandate is set forth on pages 52 and 54 of the Transcript of the Record herein, and the opinion of the Circuit Court of Appeals is printed in full on pages 54-68 of the Transcript, and will be referred to more particularly in the argument to follow. It is reported in 58 Fed. Rep., 732.

No voluntary action was taken at once by the Circuit Court under the mandate, but on December 5, 1893, The Put-in-Bay Water Works, Light and Railway Company, The Industrial and Mining Guaranty Company and Corrothers filed their joint motion for an order dismissing the cause *for want of jurisdiction* (69). The Court, thereafter, by an order entered on December 14, 1893 (69, 70), purporting in terms to be in obedience to said mandate, and not referring to the motion to dismiss the cause for want of jurisdiction, dissolved the injunction at the cost of Tillotson, and there paused.

On December 28, 1893, the motion to dismiss for want of jurisdiction came on to be heard, and a decree was entered (70, 71), appointing Irvin Belford, the Clerk of the Court, a special master commissioner for the purpose of examining the accounts of the receiver with (sic) special reference to the disposition made by him of the proceeds of the certificates heretofore issued, and containing this further direction: "It is further ordered that the master designated herein shall cause the defendants, The Put-in-

Bay Water Works, Light and Railway Company, The Industrial and Mining Guaranty Company, and John P. Corrothers, to file with him a true and correct statement of all their expenses arising from this action, and the said master shall, within the time herein fixed for his report, take testimony for the purpose of establishing the actual amount of damage sustained by said defendants, in addition to the expenses of the aforesaid defendants and the expenses found by said master to have accrued to said defendants, or any of them, and such reasonable and fair damages as they may have sustained by reason of the said cross-petitioner's action herein."

Nothing further was done by the Court, until, the special master's report having been filed (70-73), finding that the receiver had received cash funds to the amount of $12,-230.90 from all sources ($8,776.10 being proceeds from certificates), and had expended in construction, repairs, operating expenses, insurance, labor claims, and the redemption of one certificate, the aggregate sum of $11,969.58, and finding the receiver entitled to a compensation of $2,-200 for himself and attorneys, and that The Industrial and Mining Guaranty Company had incurred an expense of $8,-795.23 for attorney's fees and expenses in and by its defense to the Tillotson cross-bill and the injunction, a decree was entered on June 12, 1894 (74), granting the motion to dismiss for want of jurisdiction *on the condition* that somebody (not named, but inferentially The Put-in-Bay Water Works, Light and Railway Company) should first pay into court the amount due on the certificates issued by L. S. Baumgartner, receiver, and the payment to the clerk of the costs in this case, including the compensation of the receiver, taxed at $2,200.

On December 5, 1894, Arbuckle, Ryan & Co. filed a motion (75) alleging that the outstanding receiver's certificates were held by Walker P. Hall and James E. Hutton, and had, in fact, been fully paid and should be ordered cancelled, and requesting a finding of that fact and a dismissal of the cause in accordance with the conditional order of dismissal made and entered on June 12, 1894. This motion was not disposed of until March 4, 1895, when an entry was made (76) finding that the said certificates had not been paid, and that they were still a first lien upon all the property and franchises of The Put-in-Bay Water Works, Light and Railway Company, and decreeing that the cause should not be dismissed "until said receiver's certificates and the expenses and costs of this cause are paid in full," and overruling the motion of Arbuckle, Ryan & Co. to dismiss the cause.

On October 9, 1895, The Put-in-Bay Water Works, Light and Railway Company filed another motion for an order of dismissal (77, 78), alleging as reasons the opinion of the Circuit Court of Appeals and its mandate that such execution and further proceedings be had in the cause as according to right and justice and the laws of the United States ought to be had, the lack of jurisdictional amount in the original bill, and the collusive and fraudulent manner in which the suit had been brought, as the Circuit Court of Appeals had found. This motion was heard, after notice to all parties concerned, on May 14, 1896, with the result only that on June 3, 1896, an opinion was handed down (81, 82) in the words, *inter alia*, that the motion of The Put-in-Bay Water Works, Light and Railway Company, directing the receiver to surrender the property in his hands and dismissing the suit, should be denied, the judge saying: "My opinion being that there are certain charges incurred

in the receivership, the extent of which is not determined, which must be ascertained and satisfied before the property can be released and the case dismissed. This order, however, to be without prejudice to the renewal of a like application and motion when the situation of the case shall be ripe for dismissal."

On June 26, 1896, The Put-in-Bay Water Works, Light and Railway Company, acting upon the suggestion of the Court that an application for the dismissal of the cause might be renewed when the situation should be ripe for a dismissal, filed its petition (82-84), calling the Court's attention to its previous order directing the receiver to lease the railway property for the season, under which order the property had been leased until October 1, 1896, and tendering a good and sufficient bond for the payment of all charges incurred in the receivership that might be determined to be a first lien upon the petitioner's property, and praying for an order directing the receiver to forthwith deliver the said property to the petitioner upon the filing of said bond and to recall the lease and restore to the lessees the money paid by them for the lease, and asking for a further reference to ascertain the amount of the charges incurred by the receiver and to state an account of the proceeds of the receiver's certificates, and to whom and for what the same had been paid.

On July 15, 1896, this petition was passed upon by the Court, and an order was entered (85, 86) granting the petition so far as it prayed for a restoration of the property upon the giving of the bond tendered, but continuing it for further hearing as to the cancellation of the lease. We quote here the decretal part of the order: "It is therefore ordered, adjudged and decreed by the Court that upon the said respondent, The Put-in-Bay Water Works, Light

and Railway Company, giving its certain bond to the Clerk of this Court, for the use and benefit of the parties who may hereafter be found entitled thereto, in the sum of $20,000, and with sureties to be approved by the Clerk of this Court, and having therein the following conditions, to-wit, that the obligors of said bond bind themselves to secure the payment of all charges incurred in the receivership of this action, including the certificates aforesaid, which may finally be determined to be a lien upon the property of said respondent, The Put-in-Bay Water Work, Light and Railway Company, and shall, in giving this bond, *submit themselves to the jurisdiction of this Court* to the end that this Court may make such bond effectual for the collection of said charges by order or decree in this cause, that may be finally determined as aforesaid, said receiver turn over to said defendant company all the property of said defendant now in his hands as such receiver, including its railroad. It *is further ordered that this decree shall in no way interfere with the possession of said lessees under the lease heretofore made under the sale of June 23, 1896.* And it further appearing to the Court that The Arbuckle-Ryan Company claim to have made certain improvements and repairs upon the property of said respondent Railway Company in putting said property in condition for operation for the season of 1896, it is ordered that Charles S. Bentley be, and he is hereby, appointed a special master commissioner with directions to proceed forthwith to take testimony as to the expenditures claimed to have been made by said Arbuckle-Ryan Company in and about the preparation of the railroad of said petitioner for operation during the season of 1896, together with the dates of the items of the said expenditures, respectively, and upon the question whether same were incurred in good faith, and that the petitioner, The Put-in-Bay Water Works, Light and Railway Company, and all other interested parties shall be permitted to produce witnesses before said special master relative to such expendi-

tures, and shall be permitted to cross-examine the witnesses produced by the said The Arbuckle-Ryan Company in accordance with the usual manner of taking testimony; that the said petitioner shall be permitted to present to said special master and adduce testimony concerning any claims for damages accrued to it by reason of any action of the said Arbuckle-Ryan Co. or its agents, while claiming to occupy, repair or use said property as lessee under the former order of this Court, and that said master is hereby instructed to report to this Court without delay his findings of fact and conclusions of law as to the validity of such claims made by The Arbuckle-Ryan Company, including the good faith with which they were created, and of the said petitioner, The Put-in-Bay Water Works, Light and Railway Company, as to whether the claims of the said Arbuckle-Ryan Company should be allowed. And it is further ordered that upon the turning over by the receiver of the property now in his hands to the respondent Company, he make further report of his doings and accounts since the date of his last report upon those general subjects."

The Put-in-Bay Water Works, Light and Railway Company refused to comply with this order, and, therefore, on April 17, 1897, an order was entered (87) setting aside the decree of July 15, 1896, for a conditional restoration of the property to said Company.

On the same day, April 17, 1897, The Put-in-Bay Water Works, Light and Railway Company filed its motion (87, 88) asking for a reference to a master to ascertain and enable the Court to determine against whom the expenses of the receivership, including the certificates of indebtedness issued by the receiver, should be charged, having regard to what portion of said expenditures and the costs of this suit had resulted in permanent benefit to the said Company's property; which motion was granted (88, 89) to the ex-

tent of appointing a special master to ascertain and report the following, to wit: To what extent the expenditures and liabilities of the receiver had been incurred, (1) in permanent improvement of the Company's track or property and additions to its plant; (2) in the care and preservation of the Company's property; (3) in discharge of any lien upon the property; (4) in the payment of indebtedness for labor expended upon the property which had been incurred prior to the appointment of the receiver; (5) in other and what expenditures of the trust; (6) in matters, if any, outside of the authority given by the orders of the Court authorizing the issue and sale of the receiver's certificates; also to hear testimony and report to the Court (1) what compensation the receiver is entitled to in caring for and preserving the property, and his management as receiver; (2) what counsel fees should be allowed for legal services rendered to the receiver in the management of his trust; (3) what costs has been incurred by The Put-in-Bay Water Works, Light and Railway Company in the progress of this cause, intending hereby those which are taxable; (4) to what extent the expenditures and liabilities incurred by the receiver have resulted in permanent benefit to the property of The Put-in-Bay Water Works, Light and Railway Company.

On December 29, 1897, one Frank Holt, as Treasurer of Ottawa County, Ohio, was allowed to enter his appearance and file an intervening petition setting up a claim for delinquent taxes existing against the property of The Put-in-Bay Water Works, Light and Railway Company (89, 90).

On December 30, 1897, Arbuckle, Ryan & Co. moved the Court for an order allowing them to introduce testimony upon the question of jurisdiction "heretofore deter-

mined by the Circuit Court of Appeals in this cause," which motion was on the same day denied on the ground of laches and also "because this Court is of the opinion that the matter is foreclosed by the decision of the Circuit Court of Appeals" (91).

On the same date, December 30, 1897, the Court entered an order (91, 92) confirming the reports of Master Belford and Master Harris, awarding them and their stenographers certain compensations to be paid by the receiver out of the funds in his hands; also awarding further compensation to the receiver and his attorneys; also finding that Walker P. Hall and E. J. Dodge were the owners of the outstanding receiver's certificates and were entitled to the payment thereof out of the funds in the hands of the Court, or out of any funds that might hereafter come into the hands of the Court, or be created for that purpose, but denying the motion of Hall for a distribution at that time of said funds in payment of said certificates.

On January 31, 1898, the opinion of the Court was filed on the question of jurisdiction, *upholding the jurisdiction for the special purpose of protecting the receiver's debts and the claims of Arbuckle, Ryan & Co., and other intervenors.* This opinion is set forth in the Transcript of the Record herein, pages 93-96, and is also reported in 84 Fed. Rep., page 740.

On March 11, 1898, The Put-in-Bay Water Works, Light and Railway Company filed its motion (96-100), setting forth the findings of the master, under the order directed to him on April 17, 1897 (88, 89), and referring to the receiver's reports theretofore filed, and complaining that the Court had not as yet finally determined against whom the liabilities of the receivership and the costs in this cause

should be charged, and directing the Court's attention again to the facts that it was shown by the record that this cause had been collusively and fraudulently instituted and was in violation of Section 720 of the Revised Statutes of the United States, in that it avoided and was intended to avoid the effect of the action in replevin and the suit in equity theretofore, and at the time of the filing of the bill herein, and still pending in the Common Pleas Court of Ottawa County, Ohio, and praying that an order be entered charging the amounts of the liabilities of the receivership and the costs of this suit as justice and equity required, and to dismiss the suit.

This motion was overruled, *without any qualification*, by an order entered April 7, 1898 (100).

On April 2, 1898, The Atlantic Trust Company, a corporation created and existing under the laws of New York, and being the mortgagee trustee to whom the mortgage securing the bonds heretofore mentioned had been executed by The Put-in-Bay Water Works, Light and Railway Company, filed by leave of Court, its intervening petition by Parks and Van Campen, solicitors. It was verified by Lysander K. Parks, one of the solicitors (100-107). This intervening petition set up the fact of the execution of the mortgage and bonds, default in the payment of interest, and asserted a lien upon the property and prayed for a sale thereof and other equitable relief.

On November 25, 1898, one Simon Baruch, a citizen and resident of New York, as *amicus curiae*, filed his statement in Court (107, 108) alleging that he was a holder of and interested in some of said bonds, and objecting to the entry and appearance in this cause of The Atlantic Trust Company, alleging that the appearance by the counsel, Parks and Van Campen, was without any right or authority on

behalf of or from said Atlantic Trust Company, and that for said Company to be brought into the cause was contrary to the interest of the bond-holders, and was done by counsel, assuming to represent the said Trust Company, *but in the interest of Arbuckle, Ryan & Co.*, and showing that the claim of Arbuckle, Ryan & Co. was contrary to the interest of the holders of said bonds.

On November 21, 1898, The Put-in-Bay Water Works, Light and Railway Company demurred to the answer and cross-petition of Arbuckle, Ryan & Co., one of the grounds of the demurrer being that said Court was without jurisdiction to hear or determine any of the issues raised in said answer and cross-petition; and on the same date the said Company filed a similar demurrer, alleging a similar reason, to the intervening petition of Barbour & Starr; and on the same date filed a similar demurrer, for a similar reason, to the intervening petition of The Bodefield Belting Company, The Atlantic Trust Company and Frank Holt, Treasurer of Ottawa County. (For the foregoing demurrers see pages 108-114.)

On November 23, 1898, the Court, by its order entered on that date (114-117), overruled all of said demurrers, and made a finding of an indebtedness on the part of The Put-in-Bay Water Works, Light and Railway Company to Arbuckle, Ryan & Co. and Barbour & Starr, and overruled the suggestions of said Simon Baruch as to the filing of an interevening petition by The Atlantic Trust Company.

On April 4, 1899, Arbuckle, Ryan & Co., by leave of Court filed an amended answer and cross-bill, re-asserting their claim against The Put-in-Bay Water Works, Light and Railway Company and their lien, under the Ohio statute, upon its property, and asking for a sale of the prop-

erty and the payment of said lien out of the proceeds of sale (117-119).

On April 14, 1899, The Put-in-Bay Water Works, Light and Railway Company filed its motion protesting against the filing of the intervening petition of The Atlantic Trust Company for jurisdictional reasons therein stated (120, 121).

On June 19, 1899, Irvin Belford, as special master, filed his report (123-125) on the amended answer and cross-bill of Arbuckle, Ryan & Co. and the intervening petitions of Barbour & Starr and The Bodefield Belting Company, finding (1) that there was due to Arbuckle, Ryan & Co. the sum of $10,576.75, with interest from August 1, 1892; (2) to Marcus V. Barbour and Rowland Starr (Barbour & Starr), the sum of $538.74, with interest from June 21, 1892; (3) to The Bodefield Belting Company the sum of $338.11, with interest from September 6, 1892; also finding that each of these claimants had complied with the laws of Ohio for the procurement of liens for the material and work specified in their respective accounts and securing the claims so found due to them.

On December 12, 1899, a decree was entered (127, 128) ordering that the intervening petition of The Atlantic Trust Company be taken *pro confesso* as to all parties, on default for answers, and again referring the cause to Irvin Belford to ascertain the number and dates of sale of the bonds secured by the mortgage described in said intervening petition, the names of the owners and holders thereof, and the amounts due and unpaid thereon, both principal and interest.

On December 13, 1899, a final decree was entered (128, 129) confirming the report of Special Master Belford,

filed June 19, 1899, and, in addition to directing the payment of fees to the master and his stenographers, ordering, adjudging and decreeing that Arbuckle, Ryan & Co. had a valid and subsisting lien for the sum of $10,576.75 with interest from August 1, 1892, on the portions of the property of The Put-in-Bay Water Works, Light and Railway Company, known as the power-house and the lands on which it is located, as well as upon the buildings, fixtures, plant, machinery and appurtenances thereto and thereon; that Marcus B. Barbour and Rowland Starr (Barbour & Starr) had a lien on the same property for the sum of $538.74, with interest from June 21, 1892; and that The Bodefield Belting Company had a lien on the same property for the sum of $338.11, with interest from September 6, 1892; and fixing the priority of said liens.

On December 14, 1899, an order was entered (129, 130) granting the application of Walker P. Hall for an order directing the receiver to pay out of the funds in his hands such sums as might be proper in payment of receiver's certificates, and decreeing the payment of $1,853.94 to Walker P. Hall, and $122.07 to E. J. Dodge, which, with moneys received by Hall under a former order of court, "fully liquidates and pays all interest upon the several certificates heretofore issued and now outstanding, computed to the date of this order, December 13, 1899."

On December 15, 1899, a decree was entered (130-132) finding past due and unpaid on receiver's certificates the sum of $7,996.10, and that this amount and the costs of the case taxable against The Put-in-Bay Water Works, Light and Railway Company was the first and best lien on all the property of said Company, and, there being no income or moneys available in the hands of the receiver sufficient to

provide for the payment of said certificates and costs, ordering, adjudging and decreeing that unless said "defendant or party in interest pay or cause to be paid to the Clerk of this Court the amounts so as aforesaid found due for receiver's certificates and costs, together with the sum of $15,033.44 theretofore found due to Arbuckle, Ryan & Co., and the sum of $784.85 theretofore found due to Barbour & Starr, and the sum of $486.88 theretofore found due to The Bodefield Belting Company, within thirty (30) days from the date of the decree, all the property of The Put-in-Bay Water Works, Light and Railway Company, specifically described, and all the right, title and equity of redemption of said Company and each and every party to this action in and to the said property and in and to all property acquired by said Company since the date of the filing of the bill herein, or by the receiver appointed, should be offered for sale, etc., etc.

On March 10, 1900, the report of the marshal having been filed, showing the sale of said property under the foregoing decree for $16,501 to J. W. and C. W. Ryan, the sale was confirmed conditionally; and subsequently, on March 26, 1900, the sale was finally confirmed and a deed was ordered to be immediately executed to the purchasers (133, 134).

On June 8, 1900, an order was entered, distributing the fund (134-136).

Previous to the order of distribution, on June 2, 1900, The Put-in-Bay Water Works, Light and Railway Company presented its petition for appeal to the United States Supreme Court (137, 138) on the sole ground that the Circuit Court has no jurisdiction in this cause, and filed its Assignment of Errors (138-140) and its bond on appeal (142, 143), and the petition was allowed and a certificate of the

jurisdictional question was made by the Court (141); to all of which we respectfully refer.

ARGUMENT.

Our contention is that the Circuit Court erroneously failed and refused to dismiss the cause and to restore to appellant the possession of its property, in violation of Section 5 of the Act of Congress of March 3, 1875; and we now ask this Court to correct that error and order the restitution to the appellant which the lower court should have made.

Morris vs. Gilmer, 129 U. S. 315.

Railway Co. vs. Swan, 111 U. S. 379.

Blacklock vs. Small, 127 U. S. 96.

That the sum demanded in the original bill was false, and that the true sum was less than $2,000, exclusive of interest and costs, and that the suit had been improperly and collusively made between the complainant and the co-defendant, Tillotson, a citizen of Ohio, to enable the latter to bring into the Federal Court his controversy with the appellant, an Ohio corporation, concerning the matters and things set out in his cross bill, and that this was done to evade certain replevin and injunction proceedings then and still pending in the State court between the same parties and involving the same controversy, were facts which were never denied from the time they were brought to the attention of the Court by the pleadings, within two weeks after the original bill was filed and the receiver was appointed. The original bill was filed on September 9, 1892; the answer and cross bill of Tillotson was filed Septem-

ber 10, 1892; the answers of The Put-in-Bay Water Works, Light and Railway Company and the co-defendant Carrothers were filed September 26, 1892; and from this latter date, by the showing of these answers, to which no replication was filed, *there was not a moment when the Court was not apprised of the fact that its jurisdiction had been imposed upon.*

If the undisputed allegations of the pleadings were not sufficient to create such a legal certainty of the want of jurisdiction as to the warrant the Court *sua sponte* to proceed no further and to dismiss the suit, the evidence offered to that effect by the affidavit of Carrothers, filed October 29, 1892 (32-38), and the affidavit of F. S. Terry, representing the complainant, filed November 12, 1892 (40, 41), which were submitted to the Court, December 22, 1892 (44, 45), at the hearing of the motions to dissolve the restraining order and to discharge the receiver, were sufficient for that purpose in substance, *and were sufficient in form.* (Morris vs. Gilmer, 129 U. S. 315, 326). The conclusiveness of this evidence was established by the opinion of the Circuit Court of Appeals, which was filed in the Circuit Court as early as September 20, 1893 (54-69). *On the proposition that there was no jurisdiction the Judges of the Circuit Court of Appeals were in entire accord.*

The difficulty which the appellant encountered in urging its repeated motions for an order dismissing the suit for want of jurisdiction (the first one of which was filed December 5, 1893), originated apparently from the suggestion in the opinion of the Circuit Court of Appeals in the words found on page 67 of the printed Transcript, to wit: "With reference to the receiver's certificates, issued under the order of the Circuit Court, so far as the same have been

negotiated and their proceeds applied to the preservation and protection of the property pending this litigation, the discharge of the liens thereon and the indebtedness owing by The Put-in-Bay Company for labor which had accrued before this suit, all just and reasonable expenditures should be allowed to the receiver as made in the common interest of all concerned in the property. An order should be entered in the cause requiring the receiver to render a full and detailed account of his expenditures, the purpose for which, the persons to whom, and the dates when the same were made, and referring it to a master to examine and report upon said account."

Acting upon this allusion in the decision of the Circuit Court of Appeals to the receiver's indebtedness, Judge Ricks, who presided over the suit from its commencement until May, 1896, when Judge Severens was specially designated to act, made the first order upon appellant's motion to dismiss the cause, by appointing a master to examine the account of the receiver "with special reference to the disposition made by him of the proceeds of the certificates heretofore issued," and also by directing the master to ascertain and report the amount of the expenses and damages incurred by the appellant and The Industrial and Mining Guaranty Company and John P. Carrothers, arising out of this litigation (70, 71).

On the coming in of the report (70-73), a decree was entered on June 12, 1894 (74), granting the appellant's motion to dismiss *on the condition* that (inferentially) the *appellant* should first pay into court the amount due on the certificates (inferentially, $8,776.10), *and also the costs of the suit, including the compensation of the receiver and his attorneys, taxed at $2,200.*

On March 4, 1895, an order was entered (76) finding that the receiver's certificates had not been paid and decreeing that the suit should not be dismissed "until the receiver's certificates *and the expenses and costs of this cause are paid in full.*"

A somewhat modified order, but along the same line, was next made by Judge Severens (81-83) on June 3, 1896, thus expressed: "My opinion being that there are certain charges incurred in the receivership, the extent of which is not determined, which must be ascertained and satisfied before the property can be released and the case dismissed, even if the case be dismissed and the property surrendered; this order, however, to be without prejudice to the renewal of a like application and motion when the situation of the cause shall be ripe for a dismissal."

On June 26, 1896, the motion to dismiss was renewed by appellant (82-84) with an offer of a bond for the payment of such charges incurred by the receiver as might be determined to be a lien upon its property, and asking for a reference to ascertain the amount of such charges and for an account of the proceeds of the certificates, and as to whom and for what the same had been paid. Another feature of this motion was that it referred to a lease of the property for the summer season of 1896, which the Court had authorized the receiver to make, and which had been made, and the motion also asked that this lease be cancelled, and that the money the lessees had paid should be returned to them by the receiver, and the property surrendered to the appellant, freed from said lease. On July 15, 1896, the motion was passed upon, granting the motion so far as it prayed for the restoration of the property upon the giving of a bond, *but continuing it for further hearing as to the cancellation of the lease.* The amount of the bond required was $20,-

000, and the order of the Court was that the bond should contain *an obligation on the part of the appellant to pay all charges incurred in the receivership, including the certificates, which might finally be determined to be a lien upon the property, and that in giving said bond, the appellant should submit itself to the jurisdiction of the Circuit Court to the end that the Court might make such bond effectual for the collection of said charges by order or decree. The order also provided that the decree should in no way interfere with the possession of the lessees of the property under the lease made for the season of 1896.* The order also referred to some claims made by a party designated as The Arbuckle-Ryan Company for certain improvements and repairs upon the railway property in putting it in operation for the season of 1896, and ordered a reference to a master to take an account of said claim, with the evident purpose of adjudicating it and enforcing it as a lien upon appellant's property. (We refer the Court to this order in full, in the printed Transcript, pages 85 to 86). The appellant declined to comply with the terms of this order of July 15, 1896, and on April 17, 1897, the order, so far as it directed the restoration of the property to the appellant upon the giving of the bond required, was set aside because it had not been complied with (87).

The jurisdiction of the Court having been retained up to the time thus far indicated, and then prolonged throughout the year of 1897, on the sole theory that the suit should not be dismissed and the appellant's property restored to it until the appellant had first paid all of the receiver's indebtedness and the expenses and costs of the suit, a new reason arose in the mind of the Court why the suit *could not* be abandoned: the reports of the masters had revealed that

there was not a sufficient available fund in the hands of the receiver with which to satisfy the receiver's certificates and "other necessary charges upon the fund," so that it would be *"necessary to sell the railroad and the other real estate and fixtures belonging to The Put-in-Bay Water Works, Light and Railway Company, in order to raise a fund necessary to completely satisfy the charges"*; and matters "standing in the way of final disposition" were the cross petition of Arbuckle, Ryan & Co. and the intervening petitions of others having claims which were liens upon the property. These parties were now pressing the Court for recognition of their claims and for the adjudication of their rights to the property which was in the hands of the Court. In this situation, the Court handed down its opinion on January 31, 1898, holding that, inasmuch as it was in actual custody of the property, *although unlawfully*, and as it had been retaining the property in its unlawful possession endeavoring to bring the case into such a condition that it could be dismissed for want of jurisdiction, and while recognizing that there was no jurisdiction to proceed and decree any relief upon the original bill, the Court still had jurisdiction "to remedy the mischief which had been wrought by taking and exercising the jurisdiction, so as to prevent certain persons, who had acted in good faith upon the action of the Court while it was in possession on *apparent* jurisdiction, from suffering injury."

The conclusion of the Court was that it was its duty to take cognizance of the intervening petitions and to determine the validity of the claims therein asserted, and, if found valid, give them due effect by affording the petitioners appropriate relief.

We have come, then, to the real propositions of law which are to be considered on this appeal:

1. Did the Circuit Court have the legal power, in view of Section 5 of the Act of March 3, 1875, and the circumstances of this case, to refuse to dismiss the cause and restore to the appellant its property until the appellant should pay the debts and expenses of the receivership and the costs of the suit?

2. Did it have the power, in view of Section 5 of the Act of March 3, 1875, and the circumstances of this case, to hear and adjudicate the liens which it enforced, and to subject the appellant's property by sale to the payment of those liens?

I

Was the appellant's property subject to a jurisdiction for an account of the proceeds of the receiver's certificates and for a sale of the appellant's property for the payment of the receiver's debts, to any extent?

If Section 5 of the Act of March 3, 1875, was enacted for any purpose at all, and if the repeated decisions of this Court construing and enforcing that enactment mean anything, then, in the face of the proof in the record in this case, there was an *absolute want of power* in the Circuit Court to adjudicate anything, or to make any order except one for an unqualified dismissal of the suit and perhaps for the payment of costs. Beyond the matter of costs, no question as to what equity might require could be considered or enforced, as a condition precedent to the dismissal of the suit and the surrender of the property to the custody of the State court. And in advancing this proposition, we are not unmindful of the established doctrine, as laid down in

Mail Co. vs. Flanders, 12 Wall. 130, that a court has the inherent jurisdiction of setting aside such orders as it may have made improperly before the want of jurisdiction was discovered, and restoring things to the state in which they were before the improper orders were made. This doctrine is discussed in another part of this brief.

It can not be claimed that the Circuit Court of Appeals made a decision as to the payment of the receiver's certificates which could be conclusive on this appeal; for, by a majority opinion (Judges Lurton and Taft), that court expressly refused to make any order beyond directing the injunction to be dissolved (68, 69).

We have here purely a question of *power to act*, and within that power no consideration could be had by the Court of what the receiver had done, and no decree could be entered for his relief, to the extent of holding and subjecting to that relief the appellant's property. The receiver was the officer of the Court, and, without jurisdiction, *there was no court, and no receiver.* The Court could only do what the statute prescribed, and that was to dismiss the case, with such order as to costs as should be just, leaving the parties in interest with such remedies as they might be entitled to in some other jurisdiction. *Williams vs. Nottawa*, 104 U. S. 209, 212.

This Court has declared in *Farmington vs. Pillsbury*, 114 U. S. 138, 144, 145, that the law referred to "is equivalent to an express enactment by Congress that a circuit court shall not have jurisdiction of suits which do not really and actually involve disputes or controversies of which they have cognizance, nor of suits in which the parties have been improperly or collusively made or joined for the purpose of creating a case cognizable under the Act. In positive lan-

guage it provides that, if the assignment (suit) is collusive, the court will not proceed in the case." This rule is inflexible and without exception, to use the language of Mr. Justice Harlan, in the case of *Morris vs. Gilmer*, 129 U. S. 315, 325. When the fact of want of jurisdiction appears, "the circuit court can not maintain cognizance of the suit." *Anderson vs. Watt*, 138 U. S. 694, 702. The statute was enacted not only to protect the court, but also *the parties*, from a fraud upon the court's jurisdiction; and when the fraud occurs it is the duty of the court to stop all further proceedings, remitting the parties to their original rights, and to the remedies to which they are elsewhere entitled. *Williams vs. Nottawa*, 104 U. S. 209, 212, 213.

The policy underlying the mandatory words of the statute that the court "shall proceed no further therein, but shall dismiss the suit," thus leaving no margin of discretion to pause and consider, is forcibly vindicated by what has resulted in this very case by undertaking to qualify that command. The special jurisdiction which a sense of equity seemed to dictate, in the mind of the Court, as proper for the protection of some part of the receiver's debts, once undertaken, begat the further jurisdiction of protecting intervenors who, because the Court was continuing its wrongful custody of the property, were forced to go into the case to assert their claims against the property; and these two special jurisdictions, uniting in transcending the statute, begat as full and complete a jurisdiction as the Circuit Could would have possessed in the matter if no defect whatever had existed in its power to act. The statute was nullified absolutely; its observance existed only in the words alluding to it.

To follow out our contention that the Circuit Court had absolutely no power to retain the appellant's property as a security for the payment of any part of the receiver's indebtedness, we desire to call more particular attention to that feature of the case which relates to Section 720 of the Revised Statutes of the United States.

The record shows that the restraining order was allowed and the receiver was appointed entirely upon the statement of facts embodied in the answer and cross bill of J. K. Tillotson. (See printed Transcript, page 11.) In other words, the original bill, setting up a material man's lien and seeking a marshalling of liens, was not considered at all; the original bill was a mere pretense for the suit, filed expressly to enable Tillotson to bring into the Federal Court, by way of his cross bill, his controversy with The Put-in-Bay Water Works, Light and Railway Company and Carrothers and others over the ownership of the stock and bonds of the Company and over the right to the management and possession of its property; and the restraining order was allowed and the receivership was created wholly upon that cross bill, involving the identical dispute, and parties, and property over which the Common Pleas Court of Ottawa County, Ohio, had already acquired jurisdiction. It was for the very purpose of eluding the jurisdiction of the State court that the suit here was collusively made and the appointment of a receiver obtained. Judge Swan, in his opinion as delivered on the appeal to the Circuit Court of Appeals, presents the matter very forcibly: "The real and responsible offenders against the Act of Congress are Tillotson and Richardson, who devised and procured the scheme apparently for the purpose of avoiding the effect of the action of replevin and of the suit in equity in the State

court, in the latter of which, as the record shows, Tillotson was still under injunction from interfering with the operation of the railroad, to the control of which he asserted substantially the same rights as those pleaded in his cross bill here. That litigation appears to be still pending and constitutes an insuperable obstacle to the jurisdiction of the Circuit Court of the United States to appoint a receiver of the railroad or otherwise interfere with the possession acquired by the action of replevin, or with the effect of the injunction, or in any manner to nullify its action in any equitable suit. *Every issue presented by the cross bill as to the respective rights of Tillotson, appellants Carrothers and Warner was open to contest in either the action of replevin or the suit in equity in the State court, if not in both.* For these reasons it is obvious that the Circuit Court had no jurisdiction of this suit or its dependency, the cross bill, and its order awarding the injunction and its refusal to dissolve the same was erroneous and must be vacated and set aside, and the original and cross bills should be dismissed without prejudice."

The restraining order and the appointment of the receiver were, therefore, a positive violation of Section 720 of the Revised Statutes.

Biggs vs. Walcott, 4 Cranch 179.

Peck vs. Jenness, 7 How. 625.

Haines vs. Carpenter, 91 U. S. 254.

Dial vs. Reynolds, 96 U. S. 340.

The latest expression by this Court of the general rule which Section 720 was intended to enforce is found in the *Chetwood Case*, 165 U. S. 443, where it is embodied in the syllabus in these words: "Where the jurisdiction of the court and the right of a plaintiff to prosecute his suit in it, once attach, the right can not be arrested or taken away by proceedings in another court. When property is in the possession of a court of competent jurisdiction, that pos-

session can not be disturbed by process out of another court of concurrent jurisdiction."

The words "writ of injunction," as used in the statute, include every process or order, irrespective of the form, the effect of which is to stay proceedings in a state court. *Ex parte Schulenberg*, 25 Fed. Rep., 211. The words of the statute are not merely an inhibition against an injunction, but against preventing a party from conducting his proceedings in a state court, which the appointment of receiver herein certainly did. *Fisk vs. Railway Co.*, 6 Blatch. 362. By the service of the writ of replevin issued from the State court, the property came into the custody and possession of that court for all purposes of jurisdiction in that case, and no other court had a right to interfere with that possession, except a court having a direct supervisory control over the court issuing the writ, or some superior jurisdiction in the premises. The State court having placed the property in the possession of the officers of the Railway Company as against the claim of Tillotson, by a *writ of replevin*, the United States Circuit Court in this case had no jurisdiction to issue an injunction or to appoint a receiver by means of which the Company and its officers were prevented from using and operating the railway property which the State court had directed its officers to place in their hands. *Domestic and Foreign Missionary Society vs. Hinman*, 13 Fed. Rep. 161.

The case was plainly one for the application of the rule that the court which first takes cognizance of a controversy is entitled to retain jurisdiction until the end of the litigation, and to take possession and control of the subject-matter of the investigation, to the exclusion of all interference by other courts of co-ordinate jurisdiction.

Judd vs. Telegraph Co., 31 Fed. Rep. 182

Hagan vs. Lucas, 10 Pet. 400.

Taylor vs. Carryll, 20 How. 583.

Buck vs. Colbath, 3 Wall. 341.

"The mere forcible continuance of possession wrongfully acquired by the Federal Court did not transform that which was in the first instance wrongful into a rightful possession."

Shields vs. Coleman, 157 U. S. 168.

The doctrine applied in a case of conflicting jurisdiction in *Heidritter vs. Elizabeth Oilcloth Co.*, 112 U. S. 294, would seem to have an important bearing upon the question presented here: "Where proceedings *in rem* are commenced in a state court and analogous proceeding *in rem* in a court of the United States, against the same property, exclusive jurisdiction for the purposes of its own suit is acquired by the court which first takes possession of the *res;* and while acts of the other court thereafter, necessary to preserve the existence of a statutory right, may be supported, its other acts in assuming to proceed to judgment and to dispose of the property convey no title."

We think it follows irresistibly from the foregoing premises that the receivership created in this suit was a nullity, and that the Circuit Court was not justified in refusing obedience to the mandatory provisions of Section 5 of the Act of March 3, 1875, as a means of enforcing the payment by the appellant of any indebtedness the receiver had contracted.

Can anything be said to uphold the refusal to dismiss the suit because the costs were not paid by the appellant? Whatever may be the power of a circuit court to enter an order for costs in dismissing a suit for want of jurisdiction under Section 5 of the Act of March 3, 1875, no pre-

cedent can be found for decreeing the entire costs against the prevailing party; nor, indeed, any part of the costs, where the prevailing party was early and earnest in his objection to the jurisdiction of the court, as the record here shows this appellant to have been. We cannot discover anything in the circumstances of this case which would shield the assessment of the costs as ordered as being within the statutory expression "such order as to costs as shall be just."

Inglee vs. Coolidge, 2 Wheat. 263.
Mayor vs. Cooper, 6 Wall. 247.
Railway Co. vs. Swann, 111 U. S. 379.
Elk vs. Wilkins, 112 U. S. 98.
Smith vs. Whitney, 116 U. S. 175.
Citizens' Bank vs. Cannon, 164 U. S. 319.

II.

Did the Circuit Court have the power to retain the suit and the property because other parties having claims upon the property had intervened and were entitled to protection?

The cross petition of Arbuckle, Ryan & Company and the intervening petitions of Barbour & Starr, The Bodefield Belting Company, and Frank Holt, Treasurer, and The Atlantic Trust Company, whose claims were adjudicated and allowed, were, of course, dependent upon the jurisdiction taken upon the original bill; and it was conceded that the general rule is that when the original bill falls, all dependent bills fall with it. But the theory, stated in its last analysis, upon which this rule was disregarded in this instance, was this: These intervenors having been forced into this proceeding because this particular Court had the

actual custody of the property, and it now being discovered that such custody is unlawful, still this Court may retain that unlawful custody for the special purpose of adjudicating and enforcing the payment of the claims set up by said intervenors against said property. The opinion of the Court, to this effect, which was upheld and enforced to the extent of an adjudication which resulted in a sale of appellant's property and as complete an exercise of jurisdiction as if the original bill had been an honest one, appears in full in the Transcript of the Record, pages 93-96, and is reported in 84 Fed. Rep. 740.

Aside from the proposition of law which it embodies and which we are to meet, we desire to correct an apparent error in its statement of the facts, though perhaps not material. The intervenors whose claims were adjudicated and enforced under the special jurisdiction explained were Arbuckle, Ryan & Company, Barbour & Starr, The Bodefield Belting Company, and Frank Holt, Treasurer of Ottawa County. Arbuckle, Ryan & Company were original parties to the bill, and their claim was first set up by an answer and cross petition filed September 30, 1892, less than a month after the original bill had been filed, and four days after the answers had been filed which set forth the lack of jurisdiction. The firm of Barbour & Starr did not intervene until February 2, 1893, and The Bodefield Belting Company until April 7, 1893, at which date the appeal on the question of jurisdiction was pending in the Circuit Court of Appeals. Holt, Treasurer, did not intervene until December 29, 1897. It would therefore seem to be difficult to regard any of these claimants as within the category of those persons who had in good faith come into the Court under an apparent jurisdiction; and as the claimants

specified above are the only intervenors, aside from those persons holding receivers' certificates, who have been benefited by the decrees complained of in this cause, it is not necessary to consider any others in this connection.

The Atlantic Trust Company, however, stands in a unique position as an intervenor in the case. While it was the trustee for the holders of the bonds secured by first mortgage on the property involved and in that fiduciary relation held an interest adverse to the priority of the lien asserted by Arbuckle, Ryan & Company, its intervening petition was not filed until April 2, 1898 (100-107), and then under circumstances savoring strongly of collusion with Arbuckle, Ryan & Company. (See the suggestions of Simon Baruch, page 107, and the motion on pages 120-121). A judgment *pro confesso* was rendered on this intervening petition December 12, 1899 (127-128), but the fund finally distributed, derived from the sale of the property, did not in any way benefit The Atlantic Trust Company. (For the decree of distribution, see pages 134-136).

In reading the opinion to which we are referring, the suggestion occurs at once to ask why the intervening petitioners would have been wronged if the suit had been dismissed? They could have enforced their claims in another court, if the property had been released from its present illegal custody. If the statute of limitations had expired as to some of them pending the appellant's incessant struggle of seven years to have this suit dismissed and the property released, it was not the fault of the appellant which had caused the intervenors the wrong which would have resulted to them from an ultimate dismissal of the suit. The fault, in such case, was the Court's refusal to surrender its unlawful custody promptly; so that, after all, the question goes back

to the validity of the original reason for not dismissing the suit, namely, the refusal of the appellant to pay the receiver's debts and charges and the costs.

In saying that the theory of the opinion conceded the unlawfulness of the Court's possession of the property, we think we are entirely fair. Observe the Court's own statement explaining its special jurisdiction on page 95 of the Transcript:" If this question be considered upon the ground of the right of a third party to intervene for protection of his own interest in the pending suit, it would seem to be immaterial whether the possession of the property which the court had taken into custody was rightful or not, or whether the maintenance of possession could be justified upon legal ground. It is the fact of *actual possession* which the court has taken, and that alone, which gives the intervenor his right to appear and be heard, and to have his rights ascertained and awarded to him." The Court then cites the decision of this Court in *Gumbel vs. Pitkin*, 124 U. S. 131, and gives its understanding of that decision, and continues: "That case illustrates in a very forcible manner the fact that the question of lawfulness or unlawfulness *of the holding of possession by the court* is wholly immaterial."

While we are confident that this interpretation of the decision in *Gumbel vs. Pitkin* is erroneous, we do not care to more than mention the Court's use of it; for the point which we make is, that if there was no other reason for the unlawful holding of the property by the Court, the one fact that there were intervening petitioners seeking the Court for the enforcement of their liens against the property unlawfully held would not have been a valid reason for refusing to dismiss their petitions, together with the original bill, and to release the illegal custody of the property, thus leaving all parties to seek their remedies in the proper jurisdiction

elsewhere. This is what answers negatively the question placed in the heading of this argument, and leaves the special jurisdiction to rest alone upon the refusal to dismiss unless the appellant should pay the receiver's debts and charges and the costs of the suit.

III.

Has the Circuit Court a legal discretion as to proceeding no further and dismissing the suit, when it appears to its satisfaction that there is no jurisdiction?

It may be claimed that the statute by its express terms leaves the court to dismiss or remand the suit "as justice may require," and that justice did not require it under the circumstances of this particular case. Still this Court would have a question of jurisdiction to consider in reviewing what was considered sufficient to justify a continued exercise of jurisdiction. And perhaps it will also be claimed that the Circuit Court in this case was only exercising its inherent power to right the wrongs which may have been done to parties before the want of jurisdiction was discovered. In this state of anticipation, we proceed.

It has been shown that the intervenors could have been restored to their original rights by a *prompt* dismissal of the suit and surrender of the property to the jurisdiction of the State court from which it had been taken; and if the delay in this deprived the intervenors of any legal rights by reason of the lapse of time, then the complete answer is, that the wrong done them was done by the Court *after* the want of jurisdiction was discovered, and in such case the rule as to inherent jurisdiction to correct wrongs could not apply.

So that again and again we are brought back to the matter of the receivership and the costs of the suit, and there is nothing else in the case to be discussed.

We are satisfied that what we have already said has demonstrated that the fact that the State court first acquired jurisdiction over this cause and the parties and the property involved rendered the receivership in this proceeding *nugatory and void*, according to the Act of Congress and the decisions of this tribunal of last resort. Considering the manner in which the custody of appellant's property was acquired by the Circuit Court, its power over that property was so completely lacking that its sale thereof and the title it has undertaken to confer upon the purchasers are absolutely void. *Hendritter vs. Elizabeth Oilcloth Co.*, 112 U. S. 294. By the same token, *no valid lien under the order for the issuance of receiver's certificates was created.* And so we assert with confidence that whatever discretion the words of Section 5 of the Act of March 3, 1875, gave the Court in directing a dismissal of this suit "as justice may require," and whatever power the Court had inherently to order restitution of wrongs which had arisen by an abuse of jurisdiction, Section 720 of the Revised Statutes and the decisions construing it prohibited in emphatic terms the continued custody of the appellant's property, and rendered its appropriation to the satisfaction of the final decrees herein illegal and of no effect.

What "justice may require," under the statute, and what "restitution" a court has an inherent power to order in correcting its erroneous judgments, are not to be understood in a paradoxical sense; a duty to dismiss a cause for want of jurisdiction is not to be thwarted by the duty not to dismiss because some wrong cannot be wholly repaired by a dis-

missal. The judgment *ex necessitate* is to be reversed, and where the action is *in rem,* the *res* is at all events to be released, and the restitution is to be enforced, not by the continuance of the jurisdiction which was wrongful, but by some summary means adopted by the court independently of the suit with which it had no power to proceed; by a writ of restitution, where the money has been paid and there is a certainty as to what has been lost; by a *scire facias* where it is necessary to discover what is to be restored; and circumstances may exist where an action may be sustained to recover back the money. *Northwestern Fuel Co. vs. Brock,* 139 U. S. 216, 220.

But the remedy is *in personam,* by a summary procedure, and can never be the exact exercise of the very jurisdiction which is denied.

U. S. Bank vs. Washington Bank, 6 Pet. 8-17.

In re Morris' Cotton, 8 Wall. 507.

Ex parte Morris, 9 Wall. 605.

Mail Co. v. Flanders, 12 Wall. 130.

Northwestern Fuel Co. vs. Brock, 139 U. S. 216.

The effort of the court must be to restore things to the state in which they were before the improper orders were made; to correct those things which it had no right to do in the first instance; to restore things to their original status *as far as practicable*—but always this, that, in directing restitution, "no further wrong must be committed." *Northwestern Fuel Co. v. Brock,* 139 U. S. 216, 220.

The foremost party imposed upon was the appellant. By a fraud committed upon it and the Court by parties who were allowed to retire with perfect immunity from punishment and pecuniary loss, the appellant was deprived of the possession and earnings of its property for seven years,

at an expense and enforced liability, embracing even the compensation of the tortious custodian and his attorneys, and aggregating many thousands of dollars, as the receiver's accounts would show, were they all in the record.

It was a strange conception of justice that fastened upon this appellant a liabilty for any part of the receiver's debts. For of all the parties to the suit, the appellant above every other was least to blame for the creation of the receivership. The receivership was the prime motive in the conspiracy against the appellant in the collusive institution of this suit, and no principle of waiver or estoppel can be discovered in the action of appellant's constant protest against that collusion, which the record attests.

If some party had to be fixed upon as responsible for the redemption of the certificates, the receiver himself was not free from blame; for it requires no close scrutiny of the record to discover a grave suspicion as to his good faith. His appointment was made contemporaneously with the filing of the collusive cross bill, under circumstances of pre-arrangement which necessarily connected him with Tillotson's dishonest scheme; for he must have been at the threshold of the court when the application for his appointment was made and granted, as his bond was filed at once with one of Tillotson's own attorneys as the sole surety thereon. His connection with Tillotson is made apparent by the fact that the same attorneys who represented Tillotson represented him when his first request was made for authority to issue certificates (28-30). Why, therefore, was he not bound by their notice of the fraud by which the jurisdiction of the Circuit Court had been secured? The first order for the issue of certificates was made October 15, 1892, or twenty days after the answers

of the Put-in-Bay Water Works, Light and Railway Company and Carrothers had been filed to the original bill and Tillotson's cross bill, exposing the want of jurisdiction. These attorneys, as the common counsel of Tillotson and the receiver, were bound to take notice of those answers and of what they contained. Their knowledge was the knowledge of their clients, so far as it concerned the responsibility for the creation of debts which, for lack of jurisdiction in the court, could not legally be fastened as a lien upon the property in the custody of the receiver, when the day of final judgment should come. With this notice as a warning, the certificates were negotiated and their proceeds used. The second petition for authority to issue additional certificates was filed for the receiver by the same common counsel on December 21, 1892, and was granted at the same hearing, on the following day, at which the motions to dissolve the restraining order and to discharge the receiver were overruled, after the presentation of the identical evidence which subsequently the Circuit Court of Appeals pronounced to be conclusive proof of an utter lack of jurisdiction. This notice was certainly binding as a warning to the receiver to have a care in negotiating his certificates. We submit, with all due respect to the judicial conclusions which appear in this record, that there was a want of careful discernment regarding the conduct of the receiver, when the anxiety to protect the holders of his certificates arose.

There were no innocent holders of these certificates, so far as the appellant's rights were involved. They were not negotiable within the meaning of the law merchant. The purchasers, as a matter of law, took them subject to the final action of the court in regard to them.

Union Trust Co. v. Railway Co., 117 U. S. 434.

Railroad Co. v. Howard, 7 Wall. 392, 415.

Bank of Montreal v. Thayer, 7 Fed. Rep. 622.

Mercantile Trust Co. v. Railroad Co., 58 Fed. Rep. 11; 7 C. C. A. 3.

Gordon v. Newman, 68 Fed. Rep. 686, 689.

Buyers of such certificates must look out. They are bound to take notice of the lack of jurisdiction in the court over the property upon which the certificates purport to be a lien; they occupy no better position than a purchaser of property under a void judgment. There could be no equity, short of an estoppel, that would make an obligation, legally ineffective, enforcable as a lien upon a fund; and no estoppel existed here. No controlling equity arose from the mere fact that some part of the proceeds of the certificates may have been used to care for the appellant's property or to improve it; it requires authority on the part of an alleged trustee, or acquiescence of a clear kind on the part of the beneficiary, to charge an estate with expenditures or improvements; the fact that the estate was benefited or enriched goes for nothing in itself.

"A trustee will not be reimbursed for improvements on land of which he has tortiously retained possession."

Tatum v. McLellan, 56 Minn. 352.

"Where a party tortiously retains the title to property which he knows he ought to convey to another, he is not to be compensated for improvements made while he so retains possession."

Thompson v. Thompson, 16 Wis. 91.

It is a maxim that no man can make himself the creditor of another against the latter's consent.

The very character of the suit itself—a bill to foreclose a material man's lien and a cross bill to recover the possea-

sion of a corporation's stock and bonds—placed a cloud upon the validity of the receiver's certificates; no public welfare was involved.

Hanna v. Trust Co., 70 Fed. Rep. 2.

Wood v. Safe Deposit Co., 128 U. S. 416.

Especially as against the holders of mortgage bonds who were neither parties nor privies to the suit when the order creating the certificates as a first lien on the mortgaged property was made; a feature of this case which the recreant trustee for the holders of the bonds, when it entered its appearance at the instance of an antagonistic party to bolster up the unlawful jurisdiction, passed by in silence.

But the originators of all the unfortunate confusion shown in this record were overlooked and have so far escaped scot free. Why, in the exercise of an inherent jurisdiction to direct and enforce restitution, should Tillotson and The Electrical Supply Company have been overlooked? No consideration of justice could properly allow them to escape the costs and penalties of this collusive suit, nor full responsibility for every dollar of the indebtedness created by the certificates which by fraud they induced the court to create and place upon the market. They are still within the reach of the Circuit Court and subject to its summary order to repair the injuries they have wrought.

IV.

As to the restitution which this Court should direct, if the prayer of this appeal is granted.

If the questions which we have propounded as the headings to our argument are to be answered in the negative, it would follow, of course, that the sale of the appellant's property is void. The purchasers are parties to this appeal; they are the surviving partners of the firm of Arbuckle, Ryan & Co., and were prominently parties to this suit from its commencement to its end, combatting at all times the appellant's objection to the jurisdiction of the court. They are not even *third* parties, in their attitude as purchasers. They were actively instrumental in forcing the sale against the appellant's complaint, and against the conclusive finding of wrong by the Circuit Court of Appeals, and became purchasers and parted with their money, not only with full notice, but in energetic defiance of this appeal.

If we understand the law, it must follow that restitution will be ordered, not only of the property itself, but, against the proper parties, of all moneys which were the earnings of that property and were appropriated to the payment of the receiver's compensation, his attorneys' fees and the costs of the suit. As to the matter of the taxes, the return of the moneys paid would seem to meet a set-off in the fact of their being the appellant's debt, and there the matter may rest.

That the sale was void and conveyed no title, if jurisdiction was wanting:

Heidritter v. Elizabeth Oil Cloth Co., 112 U. S. 294.

That restitution of the property and the moneys paid will

at least be directed by this Court to be ordered by the Court below:

U. S. Bank v. Bank of Washington, 6 Pet. 8.

In re Morris, 8 Wall. 507.

Ex parte Morris, 9 Wall. 605.

Mail Co. v. Flanders, 12 Wall. 130.

Northwestern Fuel Co. v. Brack, 139 U. S. 216.

Baltimore Building Assn. v. Alderson, 99 Fed. Rep. 489.

In re Enderlin State Bank, L. R. A. 593, 604.

That the appellant shall recover the costs of this appeal, and as to the costs in the Court below on the dismissal of the suit:

In re Morris, 8 Wall. 507, 511.

Stickney v. Wilt, 23 Wall. 162.

Bradstreet v. Higgins, 114 U. S. 262.

Peper v. Fordyce, 119 U. S. 469.

Chapman v. Barney, 129 U. S. 97.

Respectfully submitted,

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